

AMENDED IN SENATE MAY 11, 2004

AMENDED IN SENATE APRIL 22, 2004

SENATE BILL

No. 1436

Introduced by Senator Murray

~~(Coauthor: Senator Bowen)~~

(Coauthors: Senators Bowen and Romero)

(Coauthors: Assembly Members Chavez, Jackson, and Nation)

February 19, 2004

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as amended, Murray. Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No existing law provides for the regulation of computer spyware.

This bill would make it unlawful for a person or entity that is not the user of a computer located in California to knowingly install spyware, as defined, on, or provide computer software containing spyware to, the computer unless the person has provided a notice meeting specified requirements. The bill would prohibit electronic mail sent from California or to a California e-mail address from containing an HTML link to spyware that automatically downloads; and would prohibit a Web page from automatically downloading spyware onto a user's computer located in California, unless notice is provided prior to the download. The bill would also prohibit a person or entity from advertising in spyware distributed or installed in violation of the prohibition. The bill would, with specified exceptions, authorize the

recipient of spyware transmitted in violation of these prohibitions or the Internet service provider to bring an action to recover actual damages, and would authorize these parties to recover liquidated damages of \$1,000 per transmission, subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff.

This bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 32 (commencing with Section 22947)
2 is added to Division 8 of the Business and Professions Code, to
3 read:

4
5 CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER
6 SPYWARE ACT
7

8 22947. This chapter shall be known as and may be cited as the
9 Consumer Protection Against Computer Spyware Act.

10 22947.1. For purposes of this chapter, the following terms
11 have the following meanings:

12 (a) "Cookie" means a text file that is placed on a computer by
13 an Internet service provider, interactive computer service, or
14 Internet Web site, and that has the sole function of recording
15 information that can be read or recognized by an Internet service
16 provider, interactive computer service, or Internet Web site when
17 the user of the computer uses or accesses the Internet service
18 provider, interactive computer service, or Internet Web site. A
19 cookie does not track or report to a third party the Web sites that
20 a user visits.

21 (b) "Install" means either of the following actions:

22 (1) Writing computer software to a computer's persistent
23 storage medium, such as the computer's hard disk, in such a way
24 that the computer software is retained on the computer after the
25 computer is turned off and subsequently restarted.



(2) Writing computer software to a computer's temporary memory, such as random access memory, in such a way that the software is retained and continues to operate after the user of the computer turns off or exits the Internet service, interactive computer service, or Internet Web site from which the computer software was obtained.

(c) "Personal information" means any of the following:

- (1) Name.
- (2) Credit card numbers.
- (3) Passwords.
- (4) Account balances.
- (5) Overdraft history.
- (6) Credit or debit card information.
- (7) Payment history.
- (8) An individually identifiable history of Web sites visited.
- (9) A social security number.
- (10) A personal identification number (PIN).
- (11) A telephone number.
- (12) An electronic mail address.
- (13) An online user name.
- (14) A home address.
- (15) A work address.
- (16) A record of a purchase or purchases.
- (17) An electronic mail, whether sent or received.

~~(d) "Settings modification feature" means a function of computer software that, when installed on a computer, does either of the following:~~

~~(1) Modifies an existing user setting, without direction from the user of the computer, with respect to another computer software application previously installed on that computer.~~

~~(2) Enables a user setting with respect to another computer software application previously installed on that computer to be modified in the future without advance notification to, and consent from, the user of the computer.~~

~~(e)~~

(d) "Spyware" means an executable computer software program that is installed on a user's computer without the knowledge of a computer user by a computer software manufacturer, computer software controller, or Web site operator, and that does either of the following:

1 (1) Gathers and transmits to the provider of the computer
2 software, to a third party, or to a remote computer or server any of
3 the following types of information:
4 (A) The personal information of a user.
5 (B) Data regarding computer usage, including, but not limited
6 to, which Internet sites are or have been visited by a user.
7 (2) Operates in a manner that is intended to confuse or mislead
8 the user concerning the identity of the person or entity responsible
9 for the performed functions or content displayed by the computer
10 software.
11 ~~(3) Contains a settings modification feature.~~
12 ~~(4) Causes advertisements to be displayed from a file located~~
13 ~~on the user's hard disk drive.~~
14 ~~(f)~~
15 (e) "User" means either of the following:
16 (1) A computer owner.
17 (2) An individual who operates a computer with the
18 authorization of the computer's lawful owner.
19 22947.2. (a) It is unlawful for a person or entity that is not the
20 user of a computer to knowingly install spyware on, or provide
21 computer software containing spyware to the user of, a computer
22 located in California unless the notice requirements of this section
23 are complied with.
24 (b) A person or entity that provides computer software
25 containing spyware to a user's computer in California, or causes
26 spyware to be placed on, or downloaded onto, a user's computer
27 located in California shall disclose, in a clear notice of at least
28 18-point font, all of the following information to the user who is
29 the recipient of the spyware:
30 (1) That the computer software contains spyware.
31 (2) What the functions of the spyware are.
32 (3) What specific personal information the spyware collects.
33 (4) How the personal information is collected.
34 (5) To whom any collected personal information is sent.
35 (6) What types of advertisements the spyware will cause the
36 user to view.
37 (7) A valid electronic mail address or toll-free telephone
38 number for the person or entity.
39 (8) The purpose for which the collected personal information
40 will be used.



~~(9) In the case of a settings modification feature, both of the following:~~

~~(A) A clear description of the nature of the modification, its function, and any collateral effects that the modification may produce.~~

~~(B)~~

~~(9) A clear description of procedures the user may follow to turn off the feature or uninstall the computer software.~~

(c) The notice required by this section shall be displayed to the user prior to the occurrence of any of the following:

(1) The computer software's opening download.

(2) A Web site placing the spyware on a user's computer.

(3) The computer software's installation.

(d) Placing the required notice in a license agreement does not satisfy the requirements of this section.

(e) Electronic mail sent from California or to a California e-mail address may not contain an HTML link to spyware that automatically downloads onto a user's computer when a viewer opens the e-mail or the link, unless a notice meeting the requirements of this section is provided prior to the download.

(f) A Web page may not automatically, upon opening the page, download spyware onto a user's computer located in California unless a notice meeting the requirements of this section has been provided prior to the download.

(g) A person or entity may not advertise in spyware distributed in violation of this section.

22947.3. (a) Notwithstanding any other provisions of this chapter, the following do not constitute spyware and are not subject to the requirements of this chapter:

(1) Paid advertisements and pop-ups that are part of a Web site as long as these paid advertisements do not place files or data on a user's hard disk drive without proper notice.

(2) Computer software or data that reports to an Internet Web site only information previously stored by that Internet Web site on the user's computer. This includes, but is not limited to, the following:

(A) Cookies.

(B) HTML code.

(C) Java-like scripts.

(b) For purposes of this chapter, a person shall not be deemed to have installed spyware on a computer solely because that person did either of the following:

(1) Provided the Internet connection or other transmission capability through which the computer software was delivered to the computer for installation.

(2) Provided the storage or hosting, at the direction of another person and without selecting the content to be stored or hosted, of the computer software or of an Internet Web site through which the computer software was made available for installation.

22947.4. (a) (1) In addition to any other remedies provided by this chapter or any other provision of law, a person who has spyware installed or receives computer software containing spyware in violation of Section 22947.2 or the Internet service provider may bring an action against the person or entity that violated Section 22947.2 to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each instance of spyware installed, or computer software containing spyware provided, in violation of Section 22947.2.

(2) The recipient or the Internet service provider, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(b) If the court finds that a defendant established and implemented, with due care, practices and procedures reasonably designed to effectively provide the notice required by Section 22947.2, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each instance of spyware installed, or computer software containing spyware provided, in violation of this chapter.

(c) There shall not be a cause of action under this section against an Internet service provider that is only involved in the routine transmission over its computer network of the computer software containing spyware.

22947.9. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.